KOPERASI KASUMA (M)

v.

PENGARAH TANAH & GALIAN SELANGOR & ORS.

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[ORIGINATING MOTION NO. 21-23 OF 1989]
21 AUGUST 1990

CONTRACT: *Equitable - Representation - Assurance of promise - State Authority - Public law vs. private law - Proprietory - Expenditure - Acts detrimental to - Belief - Exercise of statutory discretion - Clean hands - Equity.*

LAND LAW: *Application by lessee to transfer lease to third party - Approval granted after expiry of lease - Whether third party acquired equity in the land - Proprietory interest - Reverts to owner at expiry of lease - Realienation of land - National Land Code 1965, ss. 42, 46(i)(a), 50, 124, 418.*

In 1981, the third defendant D3, the State Government of Selangor granted a lease on a piece of land (the land) to Supreme Corporation (SC.). The lease which was to expire on 6 September 1986, contained an express condition that the said land could be only used strictly for the construction of residential accommodation for SC staff and a further restriction prohibiting the lessee dealing with the land without the approval of the State Authority.

On 17 September 1985, SC made an application to transfer the lease which was due to expire in one year's time to the plaintiff, K. D3 refused the application.

In 1986 K appealed to the present Menteri Besar and to his predecessor against the refusal by D3 and on 30 September 1986, K also applied for a lease of the same land.

On 26 December 1986, D3 advised SC that they had approved the application by SC to transfer the land to K; the approval was conveyed to SC 3½ months after the lease had expired. This letter advised SC to obtain further information and to take the necessary action to formalise the transfer.

On 20 July 1987, K reminded D3 about its application for lease made on 30 September 1986, and were duly informed that their application for lease was rejected. K's appeal to the Menteri Besar was also rejected.

K appeals under s. 418 of the National Land Code 1965 (NLC) for the setting aside of D1 and D2's decisions and for the defendant to re-lease the property to K.

K alleged that the Pengarah Tanah & Galian, D1, had represented to K that he would positively recommend K's application and that D3 would re-lease or alienate the land to K.

K also contended that it was entitled to apply the doctrine of estoppel to support the cause of action as they had expended large sums of money in respect of the land.

The issues therefore before the Court were:

(1) whether any representation was made by D3;

(2) If so, whether such representation would give rise to an equity in favour of K to compel D3 to release the land to K;

(3) whether the doctrine of estoppel would apply in this application.

Counsel for K argued that there was a representation by the defendant authorising transfer of ownership from SC to K after the expiry of lease and that the letter of approval to transfer the land albeit after the expiration of the lease resulted in K having equity in the said land.

Held:

[1] The letter of approval by D3 to SC was clearly intended for the removal of the restriction on the land in accordance with s. 124 of the NLC and was not an approval for a fresh lease. It was merely a consent by D3 for SC to transfer the land to K at a stated price.

[2] This approval merely set in motion the procedure of a transfer and it would be up to SC to formalise the transfer. As at that time, no formal transfer had taken place, K cannot be said to have acquired any legal interest in the land. Under s. 46(i)(a) of the NLC, the proprietory interest which was vested in SC had reverted to D3 on the expiry of the lease. Any further re-alienation of the land by D3 could only be carried out under s. 47 of the NLC.

[3] Section 124 of the NLC concerns the State Authority's power to vary a condition of any alienated land and it has nothing to do with the power to alienate land. The mere approval by D3 could not have given rise to an inference of any implied offer to re-alienate the land under s. 42 of the NLC. Section 50 is also inapplicable as this section is clearly intended to apply to condition and restriction in interest on land only.

[4] There was no representation made to K as the letter was addressed to a third party SC and not to K; even if the act of extending a carbon copy of the letter to K is to be construed as some form of representation, such representation was insufficient to give rise to an implied contract in favour of K.

[5] An approval to lift a particular restriction land cannot be taken as a clear and unambiguous promise to re-alienate the land for a term of years.

[6] On the issue of proprietary estoppel, K had not adduced satisfactory proof of expenditure incurred; in addition K's act in immediately submitting application for alienation after refusal of the transfer, revealed K's awareness that the approval in the letter was by no means a promise to extend the term of years and that he had to make a separate application for its alienation.

[7] The evidence shows that K had, with full knowledge, contravened the restriction against the use and interest on the land as he had illegally entered into a contract to purchase, build and occupy the land without D3's prior approval.

[8] The mere conveyance of a delayed approval of an application under s. 124 of NLC did not constitute an assurance or promise by the State Government to grant a further term of years by alienation of the land and therefore the doctrine of equitable estoppel will not arise; in addition equitable estoppel cannot be invoked against the State Government if the act was done in the exercise of its statutory authority or discretion.

[9] K is precluded from this equitable remedy as he himself has been guilty of an unconscionable and illegal act.

[K's application dismissed.]

Cases referred to:

Government of Negeri Sembilan & Anor. v. Yap Cheng Lan & Ors. [1984] 2 MLJ 128
Sim Siok Eng v. The Government of Malaysia [1978] 1 MLJ 15

Legislation referred to:
National Land Code 1965, ss. 42, 46(1)(a), 47, 50, 124(1)(a), 418

For the plaintiff - S. Kanawagi; M/s. Khana & Co.
For the defendants - Sallehuddin Sidin; Pejabat Penasihat Undang-undang N. Selangor

JUDGMENT

Wan Yahya J:

The plaintiff in this case is Koperasi Kasuma (M) Bhd. a co-operative company registered under the Co-operative Societies Act and currently under receivership. The 3rd defendant (State Government), against which only the plaintiff subsequently elected to proceed, is the Government of the State of Selangor.

Sometime in 1981 the State Government granted a lease on a piece of land held under Lot 3269, PT No. 3088, H.S.(M) 5258 in the District of Petaling (the land) to Supreme Corporation. The lease commencing from 7 September 1981, to 6 September 1986, contained an express condition that the land should only be used to build five residential accommodation for the Supreme Corporation staff and not for any other purpose. There was also a further restriction on interest prohibiting the lessee from selling, leasing, charging or transferring the land without the approval of the State Authority.

On 17 September 1985, Supreme Corporation made an application to transfer the lease, which was due to expire in a year's time, to the plaintiff (see Exbt. D8). The application was turned down by the State Government on 8 July 1986, (see P3). The plaintiff then wrote two identical letters, one dated 1 August 1986, addressed to Dato' Ahmad Razali, the former Menteri Besar (P4) and another dated 18 August 1986, addressed to YAB Encik Mohamad bin Haji Mohd Taib, the succeeding Menteri Besar (P7) appealing against the refusal to grant the transfer. A month later on 30 September 1986, the plaintiff also applied for a lease on the same land (D2). Meanwhile by a letter dated 26 December 1986, addressed to Supreme Corporation, the State Government approved the application by former to transfer the land to the plaintiff. Unfortunately the approval was only conveyed almost 3½ months after the lease had lapsed.

On 20 July 1987, the plaintiff sent a reminder to the State Government regarding the application for lease. To this they received a reply dated 5 April 1988, (P10) stating that the State Government had rejected their application for lease. The plaintiff again appealed to the Menteri Besar on 8 October 1988, (P11) and this was rejected on 15 June 1989, (P12).

The plaintiff now proceeding under s. 418 of the National Land Code, appealed against the decision of the State Government and seeks for the following remedies:

1. (a) The decision of the 1st defendant conveyed in a letter dated 5 April 1988, and which decision rejected the plaintiff's application for a re-lease of all the property held under Lot 3269, PT No. 3088, H.S.(M)5258, Mukim and District of Petaling Jaya, Batu 8, be set aside.

1. (b) The decision of the 2nd defendant dated 12 April 1989, in rejecting the plaintiff's appeal on the decision of the 1st defendant referred to above be set aside.

2. An order directing the 1st and 2nd defendants to re-lease the abovesaid property to the plaintiff for a minimum period permissible by the National Land Code.

3. Costs of this application be paid by the defendants.

4. That such other orders or directions be made or given as this honourable Court deems just.

In its affidavit in support of the application the receiver/manager of the plaintiff *inter alia* alleged that the representation made to the plaintiff by the Pengarah Tanah & Galian (Defendant No.1) had given rise to an implied contract that the State Government would re-lease or alienate the land to them and that the plaintiff is entitled to apply the doctrine of estoppel to support the cause of action.

The relevant parts of the 40 paragraphs affidavit appear as follows:

12. The plaintiff entered into a conditional agreement with Supreme Corporation Sdn. Bhd. to purchase the said property subject to the defendant's approval for transfer of ownership.

16. Since the lease was coming to an end the 1st defendant asked the plaintiff to apply for re-lease or re-alienation and asked Supreme Corporation Sdn. Bhd. not to re-apply for the lease.

17. Supreme Corporation did not apply for re-lease or re-alienation in keeping to their promise to sell the said property to the plaintiff.

20. The 1st defendant represented to the plaintiff that the 1st will positively recommend the plaintiff's application to the 2nd defendant.

31. I am advised and verily believe that there is an implied contract between the plaintiff and the defendant that the defendant would re-lease or alienate the said property to the plaintiff.

32.(a) I am advised and verily believe that the plaintiff (sic) have spent money and effort on the defendant's representation.

33.(a) The plaintiff had on the defendant's representation to extend the lease demolished 4 out of the 5 bungalows on the said property in order to develop the said land into a workshop area.

38. I am advised and verily believe that the plaintiff will rely on an implied contract between the plaintiff and the defendant that the defendant will re-lease the said property to the plaintiff.

39. I am advised and verily believe that the plaintiff will rely on the doctrine of estoppel to prevent the defendant to rely on their strict legal position.

41(a) Act or representation of defendant:

(i) promise made by the 1st defendant that they will re-lease property to plaintiff;

(ii) asking the plaintiff to apply for a re-lease;

(iii) asking the Supreme Corporation Sdn. Bhd. not to apply for a re-lease;

(iv) authorising transfer of ownership from Supreme Corporation to the plaintiff after the expiry date of the said lease.

(b) Act of plaintiff to their detriment:

(i) spending money buying the said land;

(ii) spending money demolishing 4 bungalows;

(iii) spending money levelling ground;

(iv) spending money building fence.

(v) spending money for arranging with the 57 squatters in the said land and obtaining their consent signatures for compensation in the event they have to vacate the premises.

The issues in so far as I can decipher from the affidavits and Counsels submissions are:

1. Whether any representation as alleged in the plaintiff's affidavit, was made by the State Government.

2. If so, whether such representation would give rise to an equity in favour of the plaintiff to compel the government to release the land to the plaintiff.

3. Whether the doctrine of estoppel would apply in this application.

In respect of the first issue above which is alleged in paras. 16 and 20 of the plaintiff's affidavit, I can find no sign of the existence of any proof in support of para. 41 (a)(i), (ii) & (iii). However Counsel in his submission appeared to have confined his argument on the allegation in para. 41(a)(iv), that is, that the letter of approval (P8) to transfer the land given after the expiry of the lease itself would result in the plaintiff "having an equity in the said land". The verbatim argument of Counsel on this theory reads as follows:

> Submits defendant by granting permission set into operation the law pursuant to National Land Code by which operation of law, plaintiff had acquired the equity in the said land. Question is for how long the equity to last. Next disputed by defendant that they had granted leave to vary the restriction on lease in allowing Supreme Corporation to transfer. This was done in exercise of powers given to State Authority under s. 42 of the National Land Code - give power to alienate state land and if for 99 years s. 76, if power to lease of 21 years - s. 63. Powers on lease is found in s. 124. Pursuant to this section defendant gave Supreme Corporation leave to transfer the said lease.
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> Section 124 National Land Code. subsection (2) and subsection (3) important on date decision was taken to give leave to transfer, the old condition came to an end and the new condition endorsed on it. Since leave given it must be a continuation of said lease or otherwise Court authority could not have evoked s. 124. What is good for defendant is also good for applicant. Defendant cannot say they invoked 124, 111 days after lease have come to an end at same time say there was no lease. To take a stand would be inconsistent to their own power of evoking s. 124.
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> Section 124(4) and subsection (5).
>
> Once s. 124 is evoked, 124(4) comes into play.
>
> Defendants are trapped in their own doings and from which they cannot retreat now. That being so it is urged that looking at whole transaction from date application was made for transfer and other sequence of re-lease by plaintiff and application after 111 days, pursuant to s. 124 meant that when transfer was given at that time, the plaintiff already have an equity in the said land.
>
> Section 50 of the National Land Code - Power of State Authority to vary provisions, etc. This section gives the plaintiff the benefit of the lease.
>
> All sections put together lead to our conclusion that defendant cannot resile from decision granted after 111 days and putting into operation the answer ... which gave the defendant the power, the plaintiff had acquired a lease.

I am unable to agree with plaintiff's rationale. To begin with the contents of the letter P8 is ostensibly clear and unambiguous. It is a reply to Supreme Corporation's earlier application for the transfer of the lease. Unfortunately the reply was conveyed three months after the expiry of the lease thus rendering the approval effete. The second paragraph of the letter contained an advice to Supreme Corporation to obtain further information and take action to formalise the transfer. The transfer in this context must necessarily relate to the position of the lease at the time the application was made and could only mean the approval to transfer

the unexpired lease. The approval was clearly intended for the removal of the restriction on the land in accordance with s. 124 of the National Land Code and not an approval for a fresh lease. It was merely a consent by the State Government for Supreme Corporation to transfer the land to the plaintiff at a stated price of RM62,000. This approval merely set in to motion the procedure of a transfer and it would be entirely for Supreme Corporation to decide whether to formalise the transfer. In other words no formal transfer had taken place at that time and the plaintiff cannot say that they have acquired any legal interest on the land. Although the proprietary interest on the land was vested in Supreme Corporation at the time of the application was made, such right had reverted to the State on the expiry of the 5 year terms in accordance with s. 46(i)(a) of the National Land Code. If any further term was contemplated the state could only realienate the land under s. 47 and not s. 124.

The plaintiff's Counsel says that by granting the permission to transfer, the plaintiff has acquired an equity on the land. He cited ss. 42, 63, 76 and 124 of the National Land Code and he argued in particular on s. 124. According to him once the State Government acted under s. 124(1) subsection 124(4) would come into play. My reading of the entire s. 124 is that it concerns the State Authority's power to vary condition of any alienated land and it has nothing to do with the power to alienate land. Even subsection (4) relied upon by Counsel only refer to the amendment to any express condition or restriction and not to any extension of term of years on alienated land. I am unable to see how, as Counsel claimed, the mere approval by the State Government could have given rise to an inference of any implied offer to realienate the land under s. 42 of the National Land Code.

Section 50 of the National Land Code under which Counsel said the State Government could have granted the extension is inapplicable as that section was clearly intended to apply to conditions and restrictions in interest on lands only.

In answer to issue numbers 1 and 2, I would say that there had been no representation of any promise made by the State Government to realienate the land to the plaintiff as the letter P8 was specifically addressed to a third party, that is, Supreme Corporation and even if the act of extending a carbon copy of letter P8 is to be considered as some form of representation by the State Government, its contents could not have created an implied contract in favour of the plaintiff.

Counsel had embarked on the equitable doctrine of estoppel. According to him, acting on the representation in P8, the plaintiff had spent money, time and effort on the land. The State Government, therefore is estopped from denying that it had agreed to grant under s. 63 a lease to the plaintiff for a further period of at least 21 years.

It is true that when a person, by his words or conduct has made to another some representation of fact with the intention that it should be acted upon or has made it in such manner that a reasonable man would have understood that the restriction should be acted on, and thereby inducing the other party to take him at his word and act to that party's detriment, then an equitable estoppel would arise and the party which made the representation would be estopped from reverting to its previous legal position as if no such promise or assurance was made;. Such estoppel, however, can only arise where there have been a clear and unequivocal representation.

An approval to lift a particular restriction on land cannot be taken as a clear and unambiguous promise to realienate the land for a term of years. For the state to be estopped in equity, two conditions must be fulfilled. First, the plaintiff must have acted to his detriment and secondly the state must have been responsible for such action by the plaintiff or to put it

in another way, that once the plaintiff is encouraged to act to his detriment by the representation or encouragement of the state, it would be unconscionable for the state to insist on its strict legal rights. This doctrine commonly known as proprietary estoppel can only arise when:

(a) the plaintiff had incurred expenditure or otherwise have prejudiced himself or acted to his detriment;

(b) the plaintiff must have acted in the belief that, that he already owned a sufficient interest or would obtain such an interest to justify the expenditure; and

(c) such belief must have arisen through the representation or encouragement of the State Government.

(d) The equity claimed would not prevent the exercise of a statutory discretion.

In respect of the expenditure incurred, the plaintiff has not, other than by way of brief references made in his letter, P4 & P7, shown any satisfactory proof. In para. 5 of both letters, the plaintiff gave a vague indication that a sum of not less than RM100,000 has been spent on the preparation of building plan in anticipation of the approval of the P.J. Town Council. However no plan correspondence or receipts were exhibited. Consequently I would consider condition (a) above unproved.

The plaintiff's assertion that it had been led into expanding large sums of money on the land in expectation of an extension of the lease is likewise without merit. If, as alleged, the plaintiff thought that P8 was tantamount to such extension, why did he submit almost immediately after his appeal against the refusal to transfer (D2), an application for alienation. By resorting to this step, the plaintiff had revealed his awareness that the approval in P8 was by no means a promise to extend the term of years and that he had to make a separate application in respect of its alienation. In any event, para. 6 of the letter P4 shows very clearly that the plaintiff was aware of the impending expiry of the lease.

The letters P4 & P7 provide abundant proof that the plaintiff had (with full knowledge) in contravention of the restriction against the use and interest on the land, illegally entered into a contract to purchase, built on and occupied the land without the prior approval of the State Government. He was fully aware at that time that Supreme Corporation interest on the land was to expire within a year or so but he was nevertheless prepared to pay RM62,000 for an illegal occupation of the land, in the hope that the anticipated prospect of approval for the transfer would place him in a favourable position to obtain realienation. But when there was a change in the leadership of the State Government and things did not turn out as he had expected, he seized upon the State Government's delayed letter, apparently written through oversight of the expiry date, as a means of forcing the consent of the State Government. In such circumstances equity cannot come to the aid of the plaintiff. "He who comes into equity must come with clean hands".

As for the encouragement through representation by the State Government, I can find no justification for such allegation. As stated earlier the representation, if at all made, was addressed and meant for Supreme Corporation and not the plaintiff. It was an approval to transfer the land to the plaintiff. Although the approval came after the expiry of the lease, the unambiguous contents of the letter was such that any reasonable man would have known that it related to the State Government's approval of the unexpired period of the lease and

has nothing to do with realienation or extension as the plaintiff termed it. Even if the letter contained some insinuation as to the continuation of the lease, I cannot see how the plaintiff could expect a further re-alienation of 21 years to Supreme's previous proprietary interest of 5 years.

The fourth condition as in (a) above relates to the right of the plaintiff to enforce his right against reversionary provision and the State Government's statutory power of disposal. By s. 46(1)(a) of the National Land Code, the land had reverted to the State Government on 6 September 1986, and by s. 41 the State Government is vested with a power of disposal over such land. Now, on the assumption that the other conditions have been proved, can an estoppel be applied by the plaintiff against the operation of s. 46(1)(a) and also the State Government's right to subsequently dispose it to any person or body other than the plaintiff.

Two local authorities on this subject are to be found in these Federal Court cases, *Sim Siok Eng v. The Government of Malaysia* [1978] 1 MLJ 15 in which a promissory estoppel was applied against the Government and another decision of the Supreme Court in *Government of Negeri Sembilan & Anor. v. Yap Cheng Lan & Ors.* [1984] 2 MLJ 128 where the equitable estoppel was denied. The distinguishing factor between these two cases lie in the nature of the transaction involved. Whereas the 1978 case relates to the contractual obligation between the parties and was concerned with private law, the 1984 case however, like our present case, appertain to the operation and the exercise of authority confined by the National Land Code and was therefore related to public law. The rationale behind these two cases is that whilst the Court would in appropriate cases apply the equitable estoppel against the Government in transaction relating to private law, it would not do so in cases where the estoppel if invoked would prevent the operation or the exercise of any right or authority conferred by statute.

It was argued before me that although the transaction in this case arose out of the National Land Code which is a public law, the moment the State Government wrote the letter P8, the transaction was transformed into a contractual offer, which is a private law. I am unable to accept this distinction. An approval arising out of and made in accordance with the provisions of the National Land Code, howsoever or by whomsoever made is nevertheless an act done in the exercise of the provision of a public law. Even if we were to accept the line of argument, it nevertheless provides no answer to the reversion of the land to the State Government by operation of law under s. 46(1)(a) of the Code.

I would hold that the plaintiff had failed to establish on the balance of probability the four requisite conditions for the application of a proprietary estoppel.

In conclusion I would reiterate my earlier findings as follows:

(a) No representation was made to the plaintiff as the letter P8 was addressed and implicitly intended for Supreme Corporation and not the plaintiff.

(b) Even if the carbon copy extended to the plaintiff is to be construed as some form of representation, such representation was insufficient to give rise to an equity in favour of the plaintiff.

(c) The mere conveyence of a delayed approval of an application under s. 124 of the National Land Code did not constitute an assurance or promise by the State Government to grant a further term of years by alienation of the land and therefore the doctrine of equitable estoppel will not rise.

(d) The plaintiff had failed to satisfy the 4 requisite conditions for the application of the doctrine of proprietary estoppel.

(e) Equitable estoppel cannot be invoked against the State Government if the act done was the exercise of its statutory authority or discretion.

(f) As the plaintiff himself has been guilty of an unconscionable and illegal act, he is precluded from this equitable remedy. The maxim "he who comes into equity must come with clean hands" applies.

For reasons abovestated, I dismissed this application with costs.

Also found at [1991] 2 CLJ 1371